Supreme Court, U.S.
FILED
OCT 15 2002
CLERK

No. 02-412

IN THE

Supreme Court of the United States

KIRK TEDFORD,

Petitioner,

v.

BENCHMARK INSURANCE COMPANY and THE BENEFIT PLAN SPONSORED BY FUTURE EQUIPMENT COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

DREW N. BAGOT
Counsel of Record
RUSSELL W. MILLS
HIERSCHE, HAYWARD, DRAKELEY & URBACH, P.C.
15303 Dallas Parkway, Suite 700
Addison, Texas 75001
(972) 701-7000

Attorneys for Respondents

176777

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Petition For A Writ Of Certiorari (the "Petition") filed by Petitioner states that the third party claims administrator, Corporate Benefit Services of America, Inc. ("CBSA"), who denied Petitioner's claim for medical benefits under an ERISA benefits plan was not delegated certain authority. Pursuant to Rule 15.2, Respondents note that the relevant documents delegated the insurer, Benchmark Insurance Company ("Benchmark"), full and complete authority to administer the benefits plan and that Benchmark granted CBSA the discretionary authority necessary to deny Petitioner's claim.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement

Benchmark is the wholly-owned subsidiary of Supermarket Insurance Agency, Inc. ("Supermarket"). Supermarket is privately-held.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statutory Provisions Involved	1
Statement of the Case	1
1. The Plan Excluded Coverage For Intoxication.	1
2. Petitioner Was Intoxicated When His Motorcycle Accident Occurred.	1
3. The Third Party Claims Administrator Denied Petitioner's Claim Based On The Intoxication Exclusion And The Test Results.	3
Reasons for Denying the Petition	4
Argument	6
I. Under *Any* Level Of Review, CBSA Properly Denied Petitioner's Claim.	6

Contents

	Page
II. The Appropriate Standard To Review CBSA's Denial Of Petitioner's Claim Is 'Abuse Of Discretion' And CBSA Did Not Abuse Its Discretion In Denying Petitioner's Claim. . .	7
A. *Pierre* Has A Limited Holding That Does Not Apply To The Facts Of This Case.	8
B. CBSA Did Not Abuse Its Discretion. . .	13
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Abnathya v. Hoffman-La Roche, Inc., 2 F.3d 40 (3d Cir. 1993) 13

Baker v. Big Star Div. of the Grand Union Co., 893 F.2d 288 (11th Cir. 1989) 10

Bogue v. Ampex Corp., 976 F.2d 1319 (9th Cir. 1992) 10

Canseco v. Const. Laborers Pension Trust for S. Cal., 93 F.3d 600 (9th Cir. 1996) 13

Carr v. Gages Health Care Plan, 195 F.3d 292 (7th Cir. 1999) 13

Cleary v. Knapp Shoes, Inc., 924 F. Supp 309 (D. Mass. 1996) 10

Donaho v. FMC Corp., 74 F.3d 894 (8th Cir. 1996) 14

Ellis v. Metro. Life Ins. Co., 126 F.3d 228 (4th Cir. 1997) 13

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) ..... *passim*

IT Corp. v. Gen. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997) 11

Cited Authorities

	Page
Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst., 46 F.3d 1264 (2d Cir. 1995)	13
Pari-Fasno v. ITT Hartford Life & Accident Ins. Co., 230 F.3d 415 (1st Cir. 2000)	13
Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552 (5th Cir.), *cert. denied*, 502 U.S. 973 (1991)	*passim*
Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151 (2002)	8
Vega v. Nat'l Life Ins. Services, Inc., 188 F.3d 287 (5th Cir. 1999)	13
Statutes:	
29 U.S.C. § 1110(a) (1998)	1, 11
29 U.S.C. § 1002(16)(A)(i) (1998)	1
29 U.S.C. § 1002(21)(A) (1998)	1, 10
TEX. PENAL CODE ANN. §§ 49.01(2)(B), 49.04 (Vernon Supp. 1999)	2
Rule:	
U.S. Supreme Court Rule 15.2	i

STATUTORY PROVISIONS INVOLVED

Respondents note that the following statutory provisions are also involved in this case: a) 29 U.S.C. § 1110(a) (1998); b) 29 U.S.C. § 1002(16)(A)(i) (1998); c) 29 U.S.C. § 1002(21)(A) (1998).

STATEMENT OF THE CASE

Petitioner has not accurately defined or sufficiently focused the Court nor any court below on the extent of authority granted Benchmark and CBSA in the relevant documents to make factual determinations under the medical benefits plan. Petitioner has also ignored the degree of evidence in the administrative record that clearly demonstrated that his claim for benefits was not covered under the medical benefits plan.

1. The Plan Excluded Coverage For Intoxication.

Although not disputed, the plain language of the insurance policy (the "Plan") issued by Benchmark to the National Health Care Trust (the "Trust") and accepted and paid for by Petitioner should be emphasized: "Benchmark shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician." Record 274, ¶U. Petitioner has never alleged that this exclusion is unclear or ambiguous or that he is not bound by the Plan.

2. Petitioner Was Intoxicated When His Motorcycle Accident Occurred.

Petitioner's accident occurred while he was riding a motorcycle without a helmet, the weather was dry and clear,

and the roadway was dry and smooth. Record 486-487, 559-560. The accident report showed that the accident involved only Petitioner's vehicle and that Petitioner made an improper turn and disregarded posted signs and turn marks. Record 487. The report concluded that these acts contributed to Petitioner's accident. Record 487.

Blood serum tests conducted on Petitioner within twenty-seven (27) minutes of the accident showed positive signs of alcohol, opiates, and amphetamines. Record 486, 496, 770, 999-1000. These test results showed that Petitioner had a blood alcohol level equivalent to .12. Record 486, 496, 999-1000. This exceeds the maximum amount of alcohol concentration for drivers in Texas of .08. TEX. PENAL CODE ANN. §§ 49.01(2)(B), 49.04 (Vernon Supp. 1999).

On the claim appeal to CBSA, Petitioner presented a statement to CBSA stating that, in his opinion, he "was not intoxicated, and any alcoholic beverages he consumed prior to his injuries did not cause those injuries." Record 618. Petitioner admitted in the appeal below that he did not remember the events leading up to the crash.[1]

---

1. In Petitioner's brief to the United States Court of Appeals for the Fifth Circuit ("Petitioner's Fifth Circuit Brief"), Petitioner stated "[o]f course, not having seen the accident, and with Tedford having no recollection of it because of his head injury. . . ." Petitioner's Fifth Circuit Brief 42-43.

3. The Third Party Claims Administrator Denied Petitioner's Claim Based On The Intoxication Exclusion And The Test Results.

The Plan provided:

> [Benchmark has] the sole and exclusive right to interpret and apply the policy's terms, conditions, limitations, exclusions and all other provisions of the policy, including but not limited to, making factual determinations under the policy as to whether benefits are payable. At any time, we may, at our sole discretion, give certain discretionary authority to other persons or entities providing administrative services to us in regard to the policy.

Record 202-203. Benchmark contracted with CBSA to act as administrator of the Plan and CBSA agreed to adjudicate claims submitted under the Plan. Record 163-187.

The Administration Agreement between CBSA and Benchmark (the "CBSA Agreement") required CBSA to review and evaluate applications, establish premium rates, bill premiums, (Record 164), terminate and rescind coverage and process, investigate, settle and pay claims. Record 165. The CBSA Agreement appointed CBSA as the administrator of the Plan. Record 163. CBSA exercised and performed its duties in a fiduciary capacity. Record 160. The Certificate of Insurance and Schedule of Benefits provided to Petitioner under the terms of the Plan also stated CBSA would "decide

whether benefits are payable on the charges for covered services submitted to them. . . ." Record 271-272.

While the CBSA Agreement required CBSA to obtain approval from Benchmark for paying a claim over $24,999, CBSA had unfettered discretion to deny claims. Record 165. CBSA reviewed Petitioner's claims twice and denied those claims based on Petitioner's test results and the intoxication exclusion in the Plan. Record 189-190, 192-193. Although he was given at least two (2) opportunities, Petitioner never offered any explanation as to how the accident occurred. Record 189-190, 192-193. He admitted in a statement submitted to CBSA that he had been drinking prior to the accident, (Record 618), and has since admitted that he does not recall the events leading up to the accident or the accident itself. Petitioner's Fifth Circuit Brief 42-43.

REASONS FOR DENYING THE PETITION

This case is not about *Pierre v. Connecticut General Life Insurance Co.*, 932 F.2d 1552 (5th Cir.), *cert. denied*, 502 U.S. 973 (1991) or about a perceived inconsistency among the courts of appeal. The trial court below reviewed the decision to deny Petitioner's claim for benefits and found that the decision was not an abuse of discretion. The United States Court of Appeals for the Fifth Circuit affirmed without reference to *Pierre*.

Petitioner argues that precedent from other circuits mandate that the trial court give a de novo review of that decision. Petitioner has consistently implied that a different result would have been reached had the trial court granted de novo review. That is simply not true.

The ultimate outcome of whether Benchmark or the third party claims administrator, CBSA, should have denied Petitioner's claim for medical benefits will not change regardless of the level of review given to that decision. There is no question that the Plan excluded coverage for losses arising from intoxication and there is ample and clear evidence in the administrative record that Petitioner was intoxicated at the time of the accident and that his intoxication caused the accident. Petitioner had every opportunity to present additional evidence to CBSA in the administrative appeals process, but did not. Petitioner denies intoxication caused his motorcycle accident, but still has not offered any other reason for the accident or any evidence that would permit anyone to determine there was another cause. By acknowledging that he does not recall the accident, Petitioner admits that he can add no further personal knowledge that would change the decision. The result would have been the same at the trial court regardless of the level of review and would not change even if Petitioner were given a de novo review now.

The Plan gave Benchmark discretionary authority to make all decisions concerning the Plan, authorized Benchmark to engage a third party administrator to assist in administration of the Plan, and authorized Benchmark to grant the third party administrator the authority to provide that assistance. Benchmark engaged CBSA, an independent, unrelated and licensed third party administrator, to make certain claims decisions required under the Plan and gave CBSA authority to make those decisions. Under trust law and well-established Supreme Court precedent, the trial court may review CBSA's decision only for an abuse of discretion.

ARGUMENT

I. UNDER *ANY* LEVEL OF REVIEW, CBSA PROPERLY DENIED PETITIONER'S CLAIM.

The Petitioner's arguments are of no moment to the resolution of this case nor do they change its outcome. Regardless of whether *Pierre* is inconsistent with other appellate courts, regardless of whether CBSA is a plan fiduciary under ERISA, and regardless of whether the relevant documents granted CBSA discretionary authority, there is clear and convincing evidence that Petitioner's claim was not covered by the benefits provided under the Plan.

There are several important facts that have never been disputed in this case:

a. The Plan clearly and unambiguously excluded loss arising from intoxication. Record 274, ¶U;

b. Petitioner's blood alcohol tests showed that Petitioner had a blood alcohol level of .12 twenty-seven (27) minutes after the accident. Record 486, 496, 999-1000;

c. The accident report showed that: Petitioner's accident occurred in dry and clear weather and on a dry and smooth roadway; Petitioner was involved in the accident alone; and Petitioner's improper turn and disregard for posted signs and turn marks contributed to the accident. Record 487;

d. Petitioner admitted that he had been drinking before the crash. Record 618, ¶¶3-4;

e. Before making its final decision, CBSA gave Petitioner at least two (2) opportunities to provide evidence for CBSA to consider. Record 189-190, 192-193. Petitioner has since admitted he does not remember the accident. Petitioner's Fifth Circuit Brief 42-43.

Regardless of the standard that any court would have applied to review CBSA's decision to deny benefits, the result would not have changed. There was substantial evidence to support CBSA's factual determination that Petitioner was intoxicated and that his intoxication caused the accident. Even if Petitioner had a de novo review today, nothing would change. Petitioner cannot remember the accident and, almost three (3) years after the accident, has not and could not present any new evidence.

II. THE APPROPRIATE STANDARD TO REVIEW CBSA'S DENIAL OF PETITIONER'S CLAIM IS 'ABUSE OF DISCRETION' AND CBSA DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S CLAIM.

This case is decided by reference to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and not *Pierre*. *Firestone* dictates that the trial court review CBSA's decision for an abuse of discretion and the facts of the case show that CBSA did not abuse its discretion.

A. *Pierre* Has A Limited Holding That Does Not Apply To The Facts Of This Case.

Following the Court's decision in *Firestone*, a number of circuit courts of appeal have addressed the appropriate standard of review to be given a fiduciary's factual determinations. Petitioner argues that the Fifth Circuit Court of Appeals' interpretation of *Firestone* in *Pierre* is inconsistent with other courts' of appeal interpretations of *Firestone*.

In *Firestone*, the Court addressed the level of review to be given to claims decisions but *only in the instance where the fiduciary or plan administrator is not given discretionary authority. Firestone*, 489 U.S. at 111 (analogizing trust law and stating "[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion"); *see also Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2170 (2002) (recently acknowledging de novo review does not apply where plan grants discretionary authority). Thus, *Pierre* and the other circuits' opinions apply only where the fiduciary or plan administrator is not given discretionary authority. *Pierre* does not apply in this case since Benchmark and CBSA had discretionary authority to make factual determinations to deny Petitioner's claim.[2]

Pursuant to the Plan, Benchmark had "the sole and exclusive right to interpret and apply the policy's terms,

2. *Every single case* cited by Petitioner acknowledges that the "abuse of discretion" review is appropriate under *Firestone* where the administrator or fiduciary has discretionary authority.

conditions, limitations, exclusions and all other provisions of the policy, including but not limited to, making factual determinations under the policy as to whether benefits are payable." Record 202-203. The Plan granted Benchmark a full and complete grant of authority as *Firestone* allows. *Firestone*, 489 U.S. at 115 (nothing "forecloses parties from agreeing upon a narrower standard of review").

The Plan also permitted Benchmark, in its sole discretion, to "give discretionary authority to other persons or entities providing administrative services. . . ." Record 202-203. As it was allowed to do, Benchmark engaged CBSA to assist in administration of the Plan and to make certain claims benefit decisions. Record 165. Petitioner argues for a less-deferential standard of review by focusing the Court on the discretionary authority granted by Benchmark to CBSA in the CBSA Agreement (complete discretion to deny claims, but limited discretion to approve claims) rather than the discretionary authority granted by the Trust to Benchmark in the Plan (full and complete authority).

The appeals court below found that CBSA had discretionary authority and applied the abuse of discretion standard. App. 3a ("despite the fact of the plan's delegation of discretionary authority to CBSA").[3] Since there is a finding below of discretionary authority and *Pierre's* holding applies only where there is no discretionary authority, *Pierre* is not relevant to this case.

---

3. After analyzing the level of discretion granted CBSA and Benchmark in the relevant documents, the trial court below concluded "[r]egardless of the discretion, if any, that the plan grants" to Benchmark or CBSA, an abuse of discretion standard is applied. Appendix 14a.

Even so, there is no requirement that CBSA have a full and complete grant of authority to perform all functions.[4] Benchmark hired CBSA as its agent only to perform certain functions and gave CBSA the discretionary authority necessary to perform those functions. Petitioner has never alleged that CBSA acted outside its authority.

Firestone noted that "one is a fiduciary to the extent he exercises *any* discretionary authority or control." *Firestone*, 489 U.S. at 113; *see also* 29 U.S.C. § 1002(21)(A) (1998) (noting person is fiduciary if he "exercises any discretionary authority" or "has any discretionary authority"). Reading the Plan and the CBSA Agreement together, Respondent had discretionary authority to make any and all decisions concerning the Plan and it hired CBSA to assist it in making those decisions. Both parties had discretionary

4. In all but two of the cases cited by Petitioner, either the employer or the insurer made the decision to deny benefits and there was no third party administrator acting on authority of the insurer. In *Cleary v. Knapp Shoes, Inc.*, 924 F. Supp 309 (D. Mass. 1996), the court held that a benefits plan that had a "proof of loss" provision did not grant discretionary authority to the third party administrator. In *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (11th Cir. 1989), the court held that a benefit plan that allowed the employer to review all of the third party administrator's claims denials did not grant discretionary authority to the third party administrator. The ultimate issue is whether the plan makes it clear to the employee which fiduciary may exercise discretionary power. *See, e.g., Bogue v. Ampex Corp.*, 976 F.2d 1319, 1325 (9th Cir. 1992) ("[w]e do not want to encourage an employer to insulate himself from effective appellate review through the use of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions"). Here, the Plan made it clear that Benchmark had full and complete authority, but that it may delegate some of that authority away. Record 202-203.

authority: Benchmark had full authority under the Plan and CBSA had the authority under the CBSA Agreement that it needed to perform it's functions.[5] Both Benchmark and the agent it retained to assist in administration, CBSA, were therefore "fiduciaries."

Petitioner argues that Benchmark and CBSA nevertheless disclaimed their fiduciary status. Petitioner's argument is against the clear language of statutes, 29 U.S.C. § 1110(a) (1998), and the case law. *See, e.g., IT Corp. v. Gen. Life Ins. Co.*, 107 F.3d 1415, 1418 (9th Cir. 1997). Petitioner's cases do not support his argument; they hold instead that if you function as a fiduciary, you *are* a fiduciary. Benchmark and CBSA both held discretionary authority and both exercised discretionary authority and therefore both are fiduciaries notwithstanding any attempted disclaimer.

The common law responsibilities of a fiduciary may have required CBSA or Benchmark to police others' use of Plan assets. For example, Benchmark could be liable for the Trust's misuse of Plan assets were Benchmark found to be a common law fiduciary. The ERISA fiduciary has a more narrow responsibility and is responsible only for the actions it takes with respect to the assets it receives in order to pay claims. While perhaps inartful, the disclaimers were merely attempts to limit CBSA and Benchmark from the broader responsibilities incumbent upon the common law fiduciary.

The undercurrent of Petitioner's argument is that, because of the attempted disclaimers and because of

5. Petitioner admits that Benchmark did not have authority to review CBSA's claims denials.

the deference accorded fiduciaries under *Pierre*, Benchmark and/or CBSA somehow acted out of self-interest or in a conflict of interest. *Firestone* itself provides a check and balance to protect against a fiduciary's self-motivation: "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115. Petitioner has never provided a single shred of evidence that demonstrates that CBSA or Benchmark operated impartially or under a conflict of interest and both the lower courts found none existed. Appendix 4a, 16a-17a.

Protection of ERISA beneficiaries and regulation of ERISA fiduciaries is a worthy goal. Petitioner preys on these concerns by arguing fervently that the deferential standard of review permits CBSA or Benchmark to commit a wrong or cause harm. Yet Petitioner never once explains to the Court what wrong Benchmark or CBSA has committed or what harm they have caused. There is plainly no abuse here.

Firestone holds trust principles sacrosanct; the case was founded on the principle that, under trust law, a trustee exercising his discretionary powers is not subject to the court's control except to prevent an abuse of discretion. *Firestone*, 489 U.S. at 112. *Firestone* prevents the Court from disturbing the trust obligations held by Benchmark except for an abuse of discretion. Here, the Plan gave Benchmark very broad and explicit trust powers and permitted Benchmark to delegate some of those powers to its agent and fellow fiduciary, CBSA. Petitioner is asking the Court to undermine its holdings in *Firestone* and to do violence to trust law all in order to receive yet another review of a claim that is clearly not covered. Requiring endless review of

ineligible or spurious claims only further increases the spiraling costs of health care benefits to employers and employees.

B. CBSA Did Not Abuse Its Discretion.

CBSA did not abuse its discretion in denying Petitioner's medical claim. Every appellate court applies some variation of the "reasonableness" standard in reviewing a fiduciary's claims decisions for an abuse of discretion.[6] The Eighth Circuit Court of Appeals perhaps explained the standard best:

> Rather, the proper reading of "reasonable" in the context of trusts and ERISA is "not immoderate or excessive"; that is, a trustee decision is reasonable if a reasonable person *could* have reached a similar decision, given the evidence before him, not that a reasonable person *would* have reached that decision. Put another way, the committee's decision need not be the only sensible interpretation, "so long as its decision 'offer[s] a

---

6. *Pari-Fasno v. ITT Hartford Life & Accident Ins. Co.*, 230 F.3d 415, 419 (1st Cir. 2000) (whether determination was "unreasonable in light of information available to it"); *Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271 (2d Cir. 1995) ("reasonable interpretation"); *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993) ("without reason, unsupported by substantial evidence or erroneous as a matter of law"); *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233 (4th Cir. 1997) ("reasonable"); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287, 296-297 (5th Cir. 1999) (same); *Carr v. Gages Health Care Plan*, 195 F.3d 292, 294 (7th Cir. 1999) (must be "downright unreasonable"); *Canseco v. Const. Laborers Pension Trust for S. Cal.*, 93 F.3d 600, 605 (9th Cir. 1996) ("reasonable").

> reasonable explanation, based on the evidence, for a particular outcome.' If the committee's decision offers a reasonable explanation, their decision should not be disturbed even if another reasonable, but different, interpretation may be made." In evaluating whether a plan administrator's fact-based disability determinations are reasonable, courts should look to whether the decision is supported by substantial evidence. Thus, under the abuse of discretion standard of review, the district court, in the absence of bad faith or conflict of interest, may overturn a decision of the plan administrator only if it is "'without reason, unsupported by substantial evidence or erroneous as a matter of law.'"

Donaho v. FMC Corp., 74 F.3d 894, 899-900 (8th Cir. 1996) (citations omitted).

In order to find that the decision to deny Petitioner's claim was an abuse of discretion, the trial court need only have found that a reasonable person *could* have found that Petitioner was intoxicated and that the intoxication caused the accident. It is simply not plausible that any trial court could have concluded that the following did not suffice as "substantial evidence":

a. a blood alcohol level of .12 twenty-seven (27) minutes after the accident. Record 486, 496, 999-1000.

b. an accident report showing that: the accident occurred in dry and clear weather and on a dry and smooth roadway; Petitioner was involved in the

accident alone; and Petitioner's improper turn and disregard for posted signs and turn marks contributed to the accident. Record 487;

c. Petitioner's admission that he had been drinking before the crash. Record 618, ¶¶3-4; and

d. Petitioner's failure to provide any other evidence for CBSA to consider after two (2) opportunities. Record 189-190, 192-193. Petitioner has since admitted he does not remember the accident.

There could hardly be any more evidence. The Court should not grant writ of certiorari.

CONCLUSION

Petitioner has offered no compelling reason to grant a writ of certiorari. Contrary to where the Petitioner hopes to lead the Court, the facts of this case do not reach *Pierre*. Regardless of whether there is a split in the circuit courts of appeal, the Court need not grant a writ in this case. This case is decided under *Firestone* and without reference to *Pierre*. Because Benchmark and CBSA had clear authority to deny Petitioner's claims, *Firestone* requires that their decisions be reviewed only for abuse of discretion.

If the Court nevertheless wishes to address *Pierre*, this is clearly not the case to do so. There is substantial evidence in the administrative record that CBSA's decision was based on a reasonable review of the facts it learned or that were presented by Petitioner during the claims appeal process. By his own admissions, Petitioner could add no new evidence

to the administrative record even if he received de novo review. Petitioner fails even to allege that CBSA or Benchmark committed an abuse of their fiduciary duties.

While Petitioner may appear to be a sympathetic figure, the Court should recognize that he is asking it to trample inviolate trust principles and to needlessly revisit *Firestone*. The decision to deny Petitioner's claim has now been reviewed by CBSA two (2) times, by a federal district court, and by a federal appeals court. Now he asks for yet another review. Mandating endless reviews of specious claims serves only to further increase the spiraling costs of health insurance. The Court should decline Petitioner's invitation and deny his request for a petition for writ of certiorari.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

DREW N. BAGOT
Counsel of Record
RUSSELL W. MILLS
HIERSCHE, HAYWARD, DRAKELEY
& URBACH, P.C.
15303 Dallas Parkway, Suite 700
Addison, Texas 75001
(972) 701-7000

Attorneys for Respondents